# United States Court of Appeals for the Second Circuit



# APPELLEE'S BRIEF

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IN THE

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

Nos. 74-1204 - 1296

COALITION FOR EDUCATION IN DISTRICT ONE, et al.,

Plaintiffs-Appellees,

vs.

THE BOARD OF ELECTIONS OF THE CITY OF NEW YORK, et al.,

Defendants-Appellants,

CAROLYN KOZLOWSKY,

Defendant-Appellant.

On Appeal From The United States District Court
For The Southern District Of New York

#### BRIEF FOR PLAINTIFFS-APPELLEES

#### Statement Of Questions Presented

l. Was the District Court's finding of racial discrimination in the conduct of the school board election in District One clearly erroneous? 2. Was voiding the election the proper remedy for the discrimination found by the District Court?

#### Statement of the Case

action complaint in the United States District Court for the Southern District of New York on September 18, 1973 (A. A,5). The complaint included an allegation that the May 1, 1973 Community School Board election in Community School District One was conducted in a manner which denied Hispanic, Black and Chinese voters in the district their right: (1) to vote; (2) not to have their votes diluted; and (3) to effectively associate for political purposes (A. 6, 24-30).

On October 5, 1973, appellants filed a notice of motion to dismiss the complaint and an affidavit in support thereof

 $<sup>\</sup>underline{1}$ / Appellants' assertion that the complaint was filed on or about October 1, 1973, is false.

(A. 35-41). The affidavit included a claim that the instant action raised questions previously litigated in <u>Lopez v</u>.

<u>Dinkins</u>, 73 Civ. 695 (S.D.N.Y. 1973) (A. 38-39). The motion was made returnable on October II, 1973 (A. 35).

On October 9, 1973, appellees submitted an order to show cause for a preliminary injunction and temporary restraining order, with supporting affidavits (A. 43-65). Appellees prayed that a preliminary injunction be granted enjoining appellants from: (1) abolishing any positions or job classifications in Community School District One that were in existence during the 1972-73 school year; and (2) taking any other irreversible action in the Community School District One (A. 43). Appellees further prayed that a temporary restraining order be issued ordering that pending the determination of appellees' motion for a preliminary injunction that appellants be restrained from abolishing three positions within Community School District One or taking any other action to terminate the employment of the

three individuals who held those positions (A. 44). Judge Stewart signed the show cause order (A. 45) thereby issuing the temporary restraining order and setting October 15, 1973 as the date for the hearing on the motion for the preliminary injunction. In addition, Judge Stewart rescheduled the hearing on appellants' motion to dismiss to October 15, 1973.

On October 15, 1973, Judge Stewart denied appellants' motion to dismiss (Tr. 13) and the hearing on appellees' motion for a preliminary injunction commenced. The hearing consumed a total of eight (8) days, spread over a period of two (2) weeks (A. 155; Tr. 1-344, 400-789). On the last day of the hearing both appellants and appellees stipulated that the hearing on the motion for a preliminary injunction would constitute a full trial on the merits and this stipulation was accepted by Judge Stewart (A. 155; Tr. 785).

During the hearing, the temporary restraining order issued on October 9, 1973, was extended (Tr. 343). In addition, two other temporary restraining orders were issued in this action (A. 101, 106).

On January 4, 1974, Judge Stewart issued an Interim Order which provided that: (1) The May 1, 1973 Community School Board Election in School District One was invalid and the positions on the board were vacant; and (2) that pending the election of a new school board the Chancellor of the City School District of the City of New York would exercise the statutory and

<sup>2/</sup> Appellees use Tr. as an abbreviation for trial record.

administrative powers of the school board of Community School District One (A. 116-117).

On January 11, 1974, Judge Stewart issued his forty-one

(41) page opinion and order (A. 153-193). Judge Stewart stated:

"The totality of the evidence adduced at trial compels this

Court to find that the May 1, 1973 District One School Board

election was conducted in a manner which had a substantial

discriminatory impact on Black, Puerto Rican and Chinese voters

and potential voters." (A. 167-168.) He ordered that: (1)

the election was declared invalid and the positions on the

local school board are declared vacant; (2) a special election

shall be held for membership on the local board and the parties

are directed to submit proposals for the scheduling and conduct

of the special election; and (3) the Chancellor shall exercise

the powers of the school board until the new board is elected

(A. 193).

On January 29, 1974, Joseph Frost, Esq. filed a notice of appeal on behalf of appellant Carolyn Kozlowsky (see docket entries in Appendix I).

On February 1, 1974, Judge Stewart issued a preliminary order appointing a three-man committee to oversee the special election (A. 213-215).

On February 21, 1974, Judge Stewart filed a memorandum and order denying appellants' motion for a stay pending the appeal of this action (see Exhibit A).

On March 4, 1974, Judge Stewart issued an order which established the date for the special election and a timetable for registration, petitioning, etc., and the procedures to be followed (A. 216-218).

On March 5, 1974, this Court granted appellants' motion for an expedited appeal and denied appellants' motion for a stay pending appeal.

#### Statement of Facts

Community School District One is one of thirty-two (32) Community School District in New York City created pursuant to New York Education Law § 2590 (A. 159). It is located on the Lower East Side of Manh ttan (A. 163) and has the highest concentration of Spanish surnamed pupils of any community school district in New York City. The ethnic composition of the student population of District One is seventy-three percent (73%) Spanish-surnamed, fifteen percent (15%) Black, five percent (5%) Oriental and seven percent (7%) others (white) (A. 165). The ethnic composition of the district does not reflect the overwhelming majority of minority students in the schools since the percentage of Black and Puerto Rican residents in District One is 41.4% (A. 164). However, there are areas in the district that are identifiable as either having a predominantly white or predominantly minority residential population (A. 164).

There has been intense racial hostility surrounding the election of the community school board in District One (A. 191-192). Because appellees feared that minority voters might be disenfranchised in the May 1, 1973 Community School Board Election, they engaged in a number of pre-election activities aimed at insuring that the right of minority residents to vote in the community school board election would be protected (A. 189-190). Their activities included participating as plaintiffs in the city-wide action, Lopez v. Dinkins, 73 Civ. 695 (S.D.N.Y. 1973) which resulted in the district court ordering that the May 1, 1973 election be conducted with multi-lingual materials and aids (A. 155-156).

New York Education Law § 2590-C establishes two classifications of voters who were eligible to vote in the May 1st election in District One. The first group was regularly registered voters who resided within the district. The second group, which only exists for community school board elections, was "parent voters." Parent voters include parents who are

<sup>3/</sup> Appellants refer to the attempts of appellant Board of Elections to provide language assistance on May 1, however, these efforts were a direct result of the actions of appellees, not the result of an independent determination by appellants that they were needed.

not regularly registered voters but have children in the schools of District One and parents who are regularly registered voters who reside outside the district but have children attending schools in the district and want to vote for the community school board that will govern the schools attended by their children (A. 159).

In addition to adding the parent voter category to the normal electorate, the May 1, 1973 community school board election differed from "regular" elections in the following ways: (1) computer print-outs of the names of regular voters were used instead of "buff cards"; and (2) the election was conducted under a system of proportional representation  $\frac{4}{4}$  (A. 160-161).

There were thirty-three (33) polling sites for District

One voters utilized in the May 1, 1973 election (A. 245-249).

Because of the concentration of different ethnic groups in

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different areas within the district some polling sites

serviced a predominantly white electorate while others serviced

a predominantly black electorate (A. 164). However, since

there was an overwhelming majority of minority students in

every school in District One (A. 223), the parent voters at

every polling site were predominantly minority voters (A. 165,

229; Tr. 60). In addition, since there were polling sites placed

<sup>4/</sup> See pages 11 and 37 infra.

<sup>5/</sup> See page 5 supra.

In predominantly white middle income cooperative apartments that were located in otherwise predominantly minority areas, there were a few polling sites in those areas that served a predominantly white electorate (A. 120, 253; Tr. 415).

The May 1, election spurred a great deal of community interest, concern and participation in District One. The rate of registration, including parent registration, was very high and the proportion of voter turnout on election day was more than twice the city-wide average (A. 166, 229, 269; Tr. 99-100).

Although the election was run as a non-partisian election and there was no official sanctioning of slates nor listing of slate affiliation on the ballots, there were in fact two slates, plus three candidates without slate affiliation running for the nine seats on the District One board. One slate, Coalition for Education in District One, was comprised of the incumbent school board, most of whom were Puerto Rican, Black and Chinese, and was recognized in the community to represent the policies of the incumbent board concerning bilingual education and parent and community involvement in the schools. The opposition slate was sponsored by a group called the Committee for Effective Education and supported, financially and otherwise, by the United Federation of Teachers.

<sup>6/</sup> The prime example of this situation is 170 Avenue C. (A. 120, 253; Tr. 415).

It consisted of eight white candidates, and one black, who happened to have the same last name as the black candidate on the Coalition slate (A. 152, 166-167, 261, 263, 265, 267, 283, 235 pp. 21a, 21b, 21c; Tr. 288, 458, 506, 511, 513, 522, 531, 548, 752). The election was bitterly contested between these two groups, and this struggle contained serious racial and ethnic overtones (A. 167).

Despite efforts to insure a smooth running election

(A. 167-168), there was tremendous confusion and a large incidence of irregularities on election day at certain polling sites servicing minority voters in District One (A. 168).

All polls were scheduled to be open—from 6:00 a.m.

through 9:00 p.m. on May 1. However, several polls servicing

predominantly minority voters opened substantially later than

6:00 a.m. This resulted from the late arrival of either the voting

materials, or the election inspectors (A. 169-170; Tr. 329, 431,

of Mr. Luis Fuentes, the controversial superintendent of District One, and appellees were his supporters. However, the record makes it clear that appellees' major interest in the election was in bilingual education and community involvement in the schools. There is no mention of Mr. Fuentes in the testimony of appellees and their witnesses. In addition, appellant Kozlowsky contends that members of the board elected in May 1970, were under attack from appellees (see pp. 4 and 5 of her brief). However the pages of the record that allegedly establish this point (Tr. 356-357) refer to statements made by counsel for appellants when Judge Stewart was considering the issuance of a second temporary restraining order and is not part of the record of this trial.

464-465, 519-520, 625). In addition, at one school, parent voter materials did not arrive at all and all eighty-three (83) registered parent voters, 83% of whom were either Spanish or Chinese surnamed, did not have an opportunity to vote (A. 170, 229; Tr. 113-114). There were no comparable problems at white polling sites (A. 171).

As has previously been stated, the order in Lopez v.

Dinkins, supra, required that multi-lingual material be readily 9/
available at the polls. While each ballot contained
instructions in Spanish, appellant Board of Elections failed to
properly deliver multi-lingual assistance materials designed to
aid minority voters which were required by the Lopez Order

(A. 171; Tr. 490, 500, 506, 508).

The parent voters, who were overwhelmingly minority voters (A. 235, pp. 25a, 25b, A. 249), experienced special problems on election day. There was general confusion with regard to where they were supposed to vote, both as to polling place and as to which election district or table they were to use at the various polling places. This resulted from the fact that many parents

B/ The late opening polls included individual tables in otherwise open polling sites as well as whole polling sites. A prime example of this is P.S. 63, a predominantly white polling site, where the parent voter cards arrived late (Tr. 625). Since the parent voters were overwhelmingly minority voters (A. 235, pp. 25a, 25b; A. 249), this delay had a detrimental effect on the ability of minority voters to cast their votes even though it occurred at a polling site servicing a predominantly white electorate.

<sup>9/</sup> See p. 6 supra.

thought they were to vote at the school their child attended, however, not all District One schools served as polling sites on May 1 (A. 172, 245, 247). In addition, several parent voters were improperly instructed to vote for District Two candidates at a school which contained polls for voters from both District One and District Two (A. 172; Tr. 227-229).

The use of computer print-outs instead of buff cards posed serious problems for election inspectors (A. 172). When buff cards are used an inspector can verify the identity of a potential voter by comparing the buff card signature with the signature of the person appearing at the polls. However, since the computer sheets did not include the voters' signature, this normal procedure could not be followed (A. 173). As a result of the lack of identifying signatures, inspectors at some election districts (E.D.'s) required written identification of voters before allowing them to vote, while others required no identification (A. 173; Tr. 291, 294, 309, 418-419, 613-615). In addition, the process of requiring identification and determining its sufficiency added to the confusion and lengthened the lines at the polling sites (A. 173; Tr. 290-291, 309, 418, 613-614).

With one exception, the polling sites at which identification was required were only those which serviced predominantly minority  $\frac{11}{\sqrt{1000}}$  voters (A. 173-174). The only predominantly white polling

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<sup>10/</sup> See p. 7 supra.

 $<sup>\</sup>underline{11}$ / See also the pages in the trial record cited in the previous paragraph.

site at which identification was required was P.S. 63, however, there is testimony on the record that the identification requirement was not administered evenly as between white and minority voters (A. 174; Tr. 260-262).

There were instances in predominantly white E.D.'s where persons whose names did not appear on the computer print-out were allowed to vote because the inspectors knew who they were (A. 174; Tr. 277-278).

The names of Spanish and Chinese voters were often incorrectly spelled or alphabetized on both computer print-outs and parent voter buff cards. These errors caused substantial delays at polling sites at which these voters appeared and, in some cases, denial of voting rights (A. 175; Tr. 120, 315, 238-12/240, 336-339, 445-448).

There were numerous incidents of minority voters experiencing difficulties in voting as a result of the conduct of election inspectors, who are paid employees of appellant Board of Elections (A. 175-176; Tr. 331, 519-520, 178, 338, 254, 312, 333, 403, 520, 649-650, 490, 500). These problems arose in part as a result of the failure of appellant Board of Elections to give proper training to its inspectors (A. 176; 197, 428-429, 675, 728-729). In addition, the inspectors received contradictory instructions concerning the May 1st election (A. 176, 239, 279). Finally, some inspectors at polling sites servicing predominantly minority

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<sup>12/</sup> See P. 17, infra.

voters used an election manual which did not provide instructions for handling the unique problems of community school board elections (A. 177, 241; Tr. 197, 437-438, 449-452).

Appellant Board of Elections also failed to train or instruct interpreters (Tr. 674). Likewise inspectors were not familiar with the interpreters' proper function. This failure to instruct resulted in a denial of necessary and proper language assistance to some minority voters in District One (A. 177-178; Tr. 455, 462, 174-176, 247-250, 266, 273, 332, 522, 632, 600, 602, 513, 529, 554-55, 601, 456).

Appellant Board of Elections created eleven new election districts within the 63rd assembly district, which encompasses most of District One, between the general election in November 1972, and May 1st. Voters in seven of these districts were assigned to new polling places. The Board of Elections also redrew the lines between old election districts in three instances and changed the polling site of one district which was not renumbered. With minor exceptions, these changes occurred in areas with greater than 40% minority population, and most occurred in areas of greater than 60% minority population. Election districts and polling sites in areas which were 80% - 100% white remained unchanged, with the exception of the 60th E.D. (A. 178-179, 249, 253; Tr. 93-94, 108, 110). Appellants have failed to explain why these changes were made and why they were limited to predominantly minority areas (A. 179).

The problems inherent in the changes in E.D. and polling sites were magnified by the fact that, although the Board of Elections mailed out notices to voters informing them of their polling sites, many voters did not receive them or received them after the election (A. 179-180; Tr. 219, 426). Therefore, many voters attempted to cast their ballots at the wrong polling site. Since election inspectors did not have election district maps and/or street finders, they were unable to direct voters to their proper polling place. This resulted in minority voters going on long searches for a place to vote, which were all too often unsuccessful (A. 180; Tr. 402-404, 434-435, 333, 713-715, 312-314).

There was a disparity in the placement of voting sites in predominantly white and predominantly minority areas in District One. Six voting sites were placed in large, predominantly white middle-income housing projects (A. 181-249; Tr. 69, 73-74). This greatly facilitated the voting process for residents of these buildings (Tr. 253, 406-407). The percentage turnout in election districts located in these buildings was 54.90% or well above the District average of 22.45% (A. 181).

No polling sites were located in buildings where the residents were predominantly Puerto Rican or Black, nor was any explanation for this site selection offered by the defendants (A. 181; Tr. 69, 73-74).

During the course of the election, particular inspectors were hostile and abusive to Puerto Rican and Black voters

(A. 181; Tr. 248, 256, 297-299, 466-467). Certain inspectors instructed minority voters to mark their ballots so as to render them invalid (A. 181; Tr. 456, 477-478). One inspector at P.S. 63 required written identification of a white voter and her black companion, but did not require such identification when white voters appeared alone (A. 181; Tr. 260-262).

Immediately after the May 1, 1973 Community School Board election appellees commenced their efforts to obtain redress for the violation of their voting rights described herein. The first attempt was made on May 3, 1973, by appellee Georgina Hoggard, who attempted to meet with David Dinkins, the then President of the Board of Elections, to discuss the election.

Mr. Dinkins was "unavailable" (A. 27).

On May 8, 1973, more than 300 community residents, including some appellees, attended public hearings on the election (Tr. 103). On the basis of the evidence presented at the meeting the Committee for Democratic Election Laws (CODEL) commenced an investigation into the conduct of the May 1st election. This investigation was hampered by the fact that needed registration records could not be examined at the offices of appellant Board of Elections because appellant Board of Elections and its members were administering the two primary elections held in New York City

during the month of June, 1973. The required records were not made available until the latter part of July, 1973 (A. 27-28; Tr. 105).

The complaint was filed in this action on September 18, 1973 (A. 5). The trial of this action, which commenced on October 15, 1973, consumed a total of eight (8) days, spread over a period of two (2) weeks (A. 155; Tr. 1-344, 400-789). A total of fifty-one (51) witnesses testified at the trial, thirty-one (31) called by appellees and twenty (20) called by appellants (A. 152).

The first witness called by appellees was Ms. Judith
Baumann, national secretary of CODEL (Tr. 21). Ms. Baumann's
testimony covered the following subjects: the interest of CODEL
in the problems of non-English speaking voters in New York City
(Tr. 24-29); the fact that CODEL became interested in the May 1,
1973 Community School Board Election because of the existence
of potential problems for non-English speaking voters (Tr. 29-35);
pre-May 1st attempts to insure that the Community School Board's
election would be conducted as a multi-lingual election; a
description of the differences in procedures and voting qualifications between Community School Board elections and "regular"
elections; an analysis of ethnic patterns in voter registration
and a discussion of pre-election efforts in the area of voter
registration (Tr. 40-66); problems relating to the location of

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<sup>13/</sup> The list at A. 152 does not include appellees witness Rosa Rivera (Tr. 475-479).

polling places (Tr. 66-79); the percentage of voter participation in predominantly white and predominantly minority election districts (Tr. 91-94); a description of post-election investigation of problems experienced by minority voters and the findings of that study (Tr. 94-133), which included problems arising from changes in polling sites (Tr. 106-113); problems experienced by parent voters (Tr. 113-118); and problems arising from the use of computer print-outs (Tr. 119-126).

The second witness called by appellees was Mr. Duncan Whiteside (Tr. 156). Mr. Whiteside discussed a study he made of the votes cast in District One, which included: (1) a description of how the proportional representation system operates; and (2) how minor changes in voting could have changed the final result of the election (Tr. 157-172, 186-188, 212-213). In addition, Mr. Whiteside described what he observed on election day at the following polling places: P.S. 19; J.H.S. 60; P.S. 64; P.S. 63; P.S. 122 and P.S. 375 Delancy Street. All of these polling places, except P.S. 63 and 375 Delancy Street, serviced predominantly minority electorates. Mr. Whiteside ended his testimony with a description of the problems arising from the use of the computer print-outs and why these operated to the detriment of minority voters (Tr. 183-185).

The third witness called by appellees was Ms. Willa Kramer, a black resident of District One (A. 152; Tr. 216). Ms. Kramer, a regularly registered voter in District One who had voted in

previous elections, described how she attempted to vote on May 1st at the polling place she had used in past elections, however, she was informed that her name did not appear on the computer list. The election officials directed her to other polling places but at each site she was told that she was not on the computer sheets and Ms. Kramer was unable to vote (Tr. 216-218). After the election, Ms. Kramer received a card indicating that her polling site had been changed (Tr. 219).

The next witness for appellees was Ms. Ada Garcia, a

Puerto Rican resident of District One (A. 152; Tr. 224). Ms.

Garcia is a regularly registered voter, the parent of a child

in District One and a Parents'-Association President (Tr. 224225). Ms. Garcia described problems that minority voters,

especially parent voters at P.S. 160, experienced on election

day. She testified that minority voters from District One were

being told to vote for candidates for the District Two school

board rather than for District One. In addition, Ms. Garcia

described problems caused by the computer sheets and problems

with language assistance. Ms. Garcia also testified that she

witnessed potential minority voters leaving the polls without

voting because of the problems they encountered (Tr. 225-235).

The fourth witness called by appellees was Ms. Flora Gelpi, a Puerto Rican resident of District One who needed the assistance of a Spanish interpreter to testify (A. 152; Tr. 238). Ms. Gelpi

testified that she is a regularly registered voter, however, when she attempted to vote at her regular voting place, J.H.S.

71, she was told that her name was not on the computer list.

Ms. Gelpi had to obtain a Court Order before she was allowed to vote. When she returned to J.H.S. 71 with the Court Order, the inspector suddenly found her name on the list. Ms. Gelpi also testified that there were other voters who likewise were told that their names did not appear on the computer list (Tr. 238-240a).

Ms. Elena Diaz, a Puerto Rican resident of District One,

(A. 152) testified that she was assigned to P.S. 110 as an

interpreter for the May 1st election. She described how the

election inspector prevented her from giving language assistance
and harassed minority voters (Tr. 244-250).

Ms. Helene Weinstein testified that the balloting went smoothly at the polling site located in her apartment building which serviced a virtually all-white electorate. In direct contrast, she observed a substantial number of minority voters being harassed and impeded by election inspectors when they attempted to vote at P.S. 110 (Tr. 252-259).

Ms. Susan Mullgrav, a white (A. 152) resident of District One, graphically described how, at P.S. 63, the requirement of producing identification varied depending upon the race of the voter (Tr. 260-262).

Mr. Emilio Jose Morante, a Puerto Rican (A. 152) resident of District One, who worked as a poll watcher at P.S. 63, testifed that there was a delay in obtaining the parent voter cards for that polling place. He also stated that because of alleged electioneering, interpreters were prevented from assisting non-English speaking voters. Mr. Morante also observed that the treatment of voters changed for the better as the racial composition of those voting became more and more predominantly white (Tr. 264-280).

Mr. William Carlotti, a white resident of District One (A. 152; Tr. 284), described his pre-election involvement as a supporter of the "community slate." On May 1st, he served as a poll watcher at P.S. 34, P.S. 64, and a school in the Grand Street area. At P.S. 34, the voters, who were overwhelmingly minority voters, were required to produce identification, even if their names appeared on the computer lists. If the election inspector was not satisfied with the identification, the right to vote was denied. In addition, the inspectors had a great deal of difficulty with the spelling of Spanish names and the use of the computer lists. Finally, the election inspectors harassed, intimidated and generally demeaned minority voters (Tr. 284-299). At P.S. 64, the atmosphere was generally the same as at P.S. 34 (Tr. 299-300). However, at the school in the Grand Street area, where the voters were predominantly white, the situation was completely different. Identification was not

required and the election was running smoothly (Tr. 300-303).

Mr. Thomas A. McCabe testified that on the morning of May lst, he worked as a poll watcher at 506 Grand Street, a polling site servicing a predominantly white voting constituency. The polls opened on time, no identification was required and the election ran smoothly (Tr. 306-308). In the afternoon, Mr. McCabe served as a poll watcher at P.S. 160, where the voters he observed were predominantly minority voters. At that polling site a substantial number of voters were turned away because they lacked identification or because their names did not appear on the computer print-out sheets (Tr. 308-309).

Ms. Hilda Morales, a Puerto Rican (A. 152) resident of District One, testified through an interpreter that she was a regularly registered voter who had voted in prior elections; that she went to her normal voting site on May 1st, but was informed her name did not appear on the computer list. Ms. Morales was directed to three other polling sites before she finally went to 80 Varick Street and obtained a Court Order to vote. During her travels in search of a place to vote, Ms. Morales saw a substantial number of minority voters also going from polling site to polling site attempting to vote, some of whom gave up and went home without voting (Tr. 311-314).

Arturo Santiago, a Puerto Rican (A. 152) resident of
District Ore, and a regular voter, testified that when he went
to vote the inspector informed him that his name was not on the

computer sheet. However, after he stated that he was familiar with the use of these sheets his name was suddenly discovered. In addition, Mr. Santiago described the late opening of the polling site at Emanuel Church and minority voters being sent from polling site to polling site in search of a place to vote (Tr. 314-320).

Mr. Victor Gonzalez testified to general problems experienced by minority voters on May 1, 1973 (A. 322-325).

Mr. Frederick Gaumer, a resident of District One, who served as a poll watcher at Emanuel Presbyterian Church, testified that since no voting materials were delivered to the church and the inspector failed to appear on time, the polling place did not open until 12:30 in the afternoon (Tr. 328-330). While the polling place was closed at least twenty-five (25) potential voters, virtually all of whom were minority voters, were turned away from the polling place (Tr. 330-331). Once the polls did open, inspectors failed to give assistance to voters who needed it and refused to permit interpreters to perform their duties. In addition, Mr. Gaumer testified that at least 102 potential voters, who were not on the computer list at Emanuel Church, virtually all of whom were minority voters, attempted to vote there because they had been sent from other polling sites. Since there were no maps or street finders at the church, Mr. Gaumer was unable to send them to their proper polling sites (Tr. 331-334).

Ms. Maria Medina, a Puerto Rican (A. 152) regular voter in District One, testified, through an interpreter, that when she attempted to vote at P.S. 34, she was told by the inspector that her name did not appear on the computer print-out. It was not until her daughter interceded on her behalf and showed the inspector that Ms. Medina's name was in fact on the computer list that she was allowed to vote (Tr. 335-339).

pard Chan, a resident of District One, of Puerto Rican and Chinese parentage (A. 152; Tr. 401) testified that he was a regularly registered voter who had voted in the 1972 general election at P.S. 34. However, when he attempted to vote there on May 1st, he was told that his name did not appear on the computer list. Mr. Chan was directed to Emanuel Church, but his name was not on the list there either. Mr. Chan testified that he did not vote on May 1, 1973 (Tr. 400-404).

Ms. Anna Rockitter, a white (A. 152) resident of District One, testified that she was given a palm card for the UFT supported slate by an individual sitting at the inspector's table at the polling site in her building which served a predominantly white electorate. Someone who she assumed was an election official, told her to vote for the candidates listed on the card (Tr. 405-409).

Mr. Nicomedes Sanchez, a Puerto Rican (A. 152) resident of District One, was a poll watcher at 170 Avenue C (Tr.

and at P.S. 61. Mr. Sanchez testified that at 170

Avenue C, which serviced a predominantly white electorate, things ran smoothly and no identification was required of voters. However, at P.S. 61, where there is a predominantly minority electorate, identification was required of all voters, and if the identification was deemed unsatisfactory, the voter was turned away. Only one voter who was turned away returned with a Court Order, and he arrived after the polls had closed and was unable to vote. In addition, there were problems arising from the fact that there were not sufficient inspectors to handle all the E.D.'s. In fact a poll watcher for the UFT slate was sworn in as an inspector and performed as such (Tr. 412-420).

Ms. Gloria Maria Ortiz, a Puerto Rican (A. 152) resident of 70 Baruch Drive, who is a regularly registered voter who, prior to May 1st voted in the day care center located at 294 Delancy Street (Tr. 422-425), testified that she was unable to vote on May 1, 1973 because her name did not appear on the computer print-out (Tr. 422-425).

Ms. Miriam Rios, a Puerto Rican (A. 152) election inspector in District One, testified that she had been working as an election inspector in the 30th E.D. for about three or four years

<sup>14/</sup> On the record, Mr. Sanchez stated the Avenue C address as being both 711 and 170, however, a review of the polling sites for the election shows that the only site on Avenue C was 170 (A. 245).

(Tr. 427) and prior to May 1, 1973, the location of that polling place was P.S. 34 (Tr. 429). Before the day of the election, Ms. Rios received a notification from appellant Board of Elections that she would once again be assigned to the 30th E.D. (A. 239). However, there was no indication on that notification that there had been a change in the polling site servicing this election district (A. 239). In addition, Ms. Rios testified that there were no meetings held by appellant Board of Elections prior to the May 1, 1973 election to instruct inspectors as to how the election was to be conducted and the only pre-election instructions she received were on the notification card sent through the mail (Tr. 429; A. 239).

Ms. Rios arrived at P.S. 34 on the morning of May 1st, and discovered that the 30th E.D. was not located there (Tr. 429-430). It was only after a phone call was made to appellant Board of Elections that Ms. Rios learned for the first time that the 30th E.D. had been moved to Emanuel Presbyterian Church (Tr. 430). Because of the late arrival of materials and inspectors, the church did not open for voters until 12:30 p.m. (Tr. 431). Ms. Rios testifed that she required that voters at the church present identification because the UFT poll watcher pressured her into doing it (Tr. 432-434). In addition, Ms. Rios

<sup>15/</sup> It should be noted that the instructions do not include a requirement that identification be shown before a voter is allowed to cast his or her ballot (A. 239).

problems in finding the proper polling site that she did (Tr. 434-435). Finally, Ms. Rios testified that plaintiffs' Exhibit 10 (A. 241) was the basic resource material that she had been given to refer to if problems arose at elections (Tr. 435-438).

Ms. Nuet Fong Ng, a Chinese (A. 152) resident of District One who came from Hong Kong in 1971 (Tr. 448) and neither speaks nor writes English (Tr. 447), testified, through an interpreter, that she registered as a parent voter for the May 1st election. However, when she appeared at P.S. 160, the school which her child attends and where she registered as a parent voter, the inspector was unable to find her name in the parent buff cards and she was unable to vote (Tr. 445-447). On cross-examination, Ms. Ng was asked whether she had received a postcard telling her where to vote and her answer was: "Because I do not read English, the only thing I know I regestered there so I go there to vote" (Tr. 448).

After Ms. Ng completed her testimony Mr. Nicomedes Sanchez was recalled to the stand and testified that plaintiffs' Exhibit
10 (A. 241) was used as a reference source by election inspectors at 170 Avenue C and P.S. 61 (Tr. 449-451).

Lee Ching Chan, a Chinese (A. 152) resident of District One, testified, through an interpreter, that she registered as a parent voter at P.S. 63, which is the school her child attends. However,

when she attempted to vote there she was informed that her name could not be found among the parent buff cards. It was not until she demanded that she be allowed to vote and appealed for assistance to the principal of the school, who was also Chinese, that her name was found and she was allowed to vote. However, since the Chinese interpreter was not allowed to assist her in voting and since she can only read Chinese symbols and the names were written in English, she did not know whom she was voting for (Tr. 453-456).

Ms. Ethel Lobman, President of appellee Coalition for Education in District One, testified that on May 1st, she was in the Coalition headquarters from 7:30 a.m. until after the polls closed and that there was a monumental number of complaints received relating to problems experienced by minority voters. Even though appellee Coalition made attempts to give assistance, since the requests for aid numbered in the hundreds, they were unable to insure that any substantial number of potential voters would be able to vote (Tr. 457-461).

Ms. Yuk Ching Lum, a Chinese (A. 152) resident of District One, who was born in Macao (Tr. 463), testified, through an interpreter, that she was a parent voter who voted at P.S. 160 in the May 1, 1973 election. However, since she can only read Chinese symbols and the names on the ballot were only in English, she did not know who she was voting for (Tr. 461-463).

<sup>16/</sup> See A. 249.

Ms. Louise Elaine Armstrong, a white (A. 152) resident of District One, testified that she worked as an election inspector in P.S. 61. Because of the late arrival of the inspectors the polls did not open at that polling place until approximately 7:45 a.m. The inspectors were late because they were informed that certain E.D.'s had been moved from other sites to P.S. 61. However, after they arrived there were still not enough inspectors to man the tables for all of the E.D.'s at P.S. 61. To remedy this problem, a UFT poll watcher was sworn in as an inspector and put in charge of a table that only serviced parent voters. This UFT poll watcher turned inspector challenged every parent voter and generally delayed the voting process for these voters (Tr. 464-468).

Armin Ruiz, a Puerto Rican (A. 152) resident of District One, described his attempts to vote at Emanuel Church, which included the fact that Mr. Ruiz was required to go home and obtain identification before he could vote, even though the inspector recognized him (Tr. 471-475).

Ms. Rosa Rivera, a resident of District One, testified, through a Spanish interpreter, that she was a regular voter

<sup>17/</sup> Emanuel Church is the polling site where Ms. Rios worked as an inspector and testified that she required identification because of pressure from the UFT poll watcher. See p.25, supra.

who voted at P.S. 82 on May 1, 1973. Ms. Rivera stated that she wanted to vote for seven specific candidates, however, she was instructed that she must put check marks next to the names of nine candidates and that is what she did (Tr. 475-478).

Ms. Petra Santiago, a Puerto Rican (A. 152) resident of District One, testified that she was instructed by an inspector to sign the back of her ballot (Tr. 479-480).

Ms. Luz Martinez, a Puerto Rican (A. 152) resident of
District One, testified, through an interpreter, that she and
her husband registered together as parent voters at P.A. 122.
However, on May 1st, the inspectors could only find her parent
voter's buff card and only she was allowed to vote (Tr. 482-483).

At this point, appellees rested their case (Tr. 484).

The first witness called by appellants was Ms. Ray Frankel, a white (A. 152) staff member of the UFT who does not reside in District One. Ms. Frankel testified: that she worked as a poll watcher at P.S. 63 (Tr. 487); that there was one E.D. out of approximately four that opened a few hours late; that those who came in before it opened were asked to return, and some in fact did (Tr. 487). Ms. Frankel testified that she did not think that there was any delay in the opening of voting for parent voters and that there was only one E.D. that didn't open on time (Tr. 493-494). In addition, Ms. Frankel testified that she didn't think that indentification was being required at P.S. 63 and, if it was, she wasn't aware of it (Tr. 496). Ms. Frankel

also testified that, except for the ballots themselves, there were no multi-lingual materials to assist voters (Tr. 489-490, 491).

The second witness called by appellants was Ms. Evelyn Sansolo, a white (A. 152) resident of District One, who testified that she served as a poll watcher at P.S. 110 between the hours of noon and 3:00 p.m. She stated that there were only a few voters who came into the polling site during that time, that she did not see any bilingual material and that she did not see identification being required (Tr. 499-502).

Appellants next witness was Edward Blume, a white (A. 152) resident and teacher in District One, who testified that he worked as a poll watcher at P.S. 19 during non-school hours. He stated that all of the election officials were white; he estimated the voters to be 50% white, 50% minority, and that the election ran smoothly. In addition, Mr. Blume testified that there were no bilingual materials and that he did not notice identification being required (Tr. 502-506a).

Ms. Natalie Shutzer, a white (A. 152) non-resident, testified that she served as a poll watcher at P.S. 110 from sometime after 3:00 p.m. until the polls closed and that there were no bilingual materials available (Tr. 507-509).

Mr. Abraham Levine, a white (A. 152) Vice President of the UFT, who does not live in District One, testified that he served as a poll watcher at Emanuel Church and that the church

did not open before noon. He further stated that only minority voters were turned away because the polls were closed, and that identification was required. In addition, Mr. Levine testified that he objected to interpreters assisting voters in filling out their ballots (Tr. 511-515).

Mr. Toney Gennaro, a white (A. 152) teacher in District
One, testified that: he worked as a poll watcher at P.S. 160
during non-school hours; that the polls opened late, but before
8:30 a.m., because of an insufficient number of inspectors; and
that a number of people erroneously came to P.S. 160 rather than
their proper polling place (Tr. 518-527).

Ms. Sharon Danenberg testified that she was a poll watcher at P.S. 134 and J.H.S. 71. She stated that the polls at P.S. 134 opened a little late, but only a few people could not vote.

In addition, there were a few people who could not vote at P.S. 134 because their E.D. lines had been changed. Ms. Danenberg further testified that at P.S. 71, about 15% of the voters were turned away because their names did not appear on the computer print-out sheets. These voters were directed to get court orders and three or four returned (Tr. 528-536).

Ms. Rita Ruben, a white (A. 152) teacher in District One, testified that she was a poll watcher at P.S. 34 during non-school hours and that she did not see inspectors hand anything besides ballots to voters (Tr. 536-538).

Ms. Marilyn Ruda, a white (A. 152) teacher in District One, testified that she served as a poll watcher at P.S. 20 during non-school hours and that parent voters were presenting registration cards, which were apparently issued by the school superintendent's office, and many of these parents' names did not appear on parent voter buff cards. In addition, Ms. Ruda testified to an instance when an interpreter was electioneering (Tr. 541-557).

Ms. Emily Arroyo, a Puerto Rican (A. 152) resident of District One, testified that she was sworn in as an election inspector at P.S. 188 some time after 1:00 p.m. because there were fewer than the required number of inspectors in attendance. While serving as an inspector, Ms. Arroyo was involved in a confrontation with a young lady who challenged her authority to perform as an inspector. This confrontation culminated in a fight three days after the election (Tr. 559-565).

Prof. Archibald Robertson, Jr., who was in charge of counting the ballots in District One, described how the count was performed and stated that it went smoothly because he had a carefully selected and well trained staff supporting him (Tr. 566-592).

Joseph Fristachi, Esq., Executive Assistant to New York

State Attorney General Lefkowitz, testified that he was responsible

for monitoring and assisting in District One on May 1, 1973. He

stated that he knew that the following problems arose on election

day: (1) the parent books were late in arriving at P.S. 20, P.S. 46 and P.S. 63 (Tr. 625); (2) P.S. 63 did not have a full complement of inspectors; (3) there were problems with interpreters electioneering at P.S. 63 and P.S. 188; (4) his office received numerous complaints from voters that they were registered but their names could not be found on the computer list; (5) an individual was allegedly harassing minority voters at P.S. 134, where there was considerable friction and confusion; (6) there were no ballots at P.S. 64, and sample ballots had to be used instead, however, some people were turned away before the use of sample ballots were authorized; and (7) inspectors were requiring identification at P.S. 63. In addition, Mr. Fristachi testified that he had not been informed by appellant Board of Elections that Emanuel Church was a polling site (Tr. 592-630).

Ms. Shelvy Young, a black (A. 152) resident of District One, who served as a poll watcher for the UFT slate, testified that she observed interpreters electioneering in Spanish and Chinese (Tr. 630-637).

Mr. Paul Greenberg, director of appellant Board of Elections' special section that ran the Community School Board elections on May 1, 1973, testified that notices sent to new voters were only written in English; that there were failures in the delivery of election related materials on May 1, 1973 and; that the booklet "Instructions to Inspectors Community School Board Election May 1, 1973" (A. 279) was included in this election

material. In addition, Mr. Greenberg testified that interpreters and inspectors had not been trained for the May 1, 1973 election (Tr. 638-683).

Ms. Martha Lugo, a Puerto Rican (A. 152) resident of District One, testified that she voted on May 1, 1973 with her husband at P.S. 2, a school located outside of District One, which included polling sites servicing District One, and she was required to show identification (Tr. 688-689).

Ms. Rafaela Rodriguez gave testimony which was substantially the same as Ms. Lugo's (Tr. 690-692).

Ms. Myrta Acevedo, a Puerto Rican resident of District
One, testified that she voted at Seward Park High School Annex
without difficulty (Tr. 692-694).

Ms. Carmen Sameday, a Puerto Rican resident of District One, testified, through an interpreter, that she voted at 200 Monroe Streat but was required to show identification (Tr. 694-696).

Ms. Evelyn Yakowitz, an employee of appellant Board of Elections, gave testimony: (1) relating to methods by which a voter's proper polling site can be determined; (2) relating to locating names on buff cards and computer lists; (3) the procedure for obtaining court orders to vote; and (4) the training of election inspectors. It was established that: (1) using a voter's address the only way to determine his proper polling place is with both a map and street finder; (2) street finders were not

witnesses was misspelled on the parent voter buff card; (4)
Ms. Yakowitz could not find the card of another witness for
appellees because it was in improper alphabetical order; (5)
as a general rule, court orders for voting are only issued
when proof of registration is found at the offices of appellant
Board of Elections; and (6) Ms. Yakowitz was not certain that
inspectors had received special training for the May 1, 1973
election (Tr. 697-730).

After the testimony of Ms. Yakowitz, Mr. Whiteside, who 18/
had previously testified for appellees, was recalled for additional cross-examination which related to his employment by District One (Tr. 738-743).

Appellants then called Joseph Frost, Esq., whose testimony related to palm cards and UFT involvement in the election (Tr. 748-753).

After the testimony of Mr. Frost, appellants rested (Tr. 753).

<sup>18/</sup> See p. 17, supra.

<sup>19/</sup> Mr. Frost is presently representing appellant Carolyn Kozlowsky on this appeal.

Appellees then called rebuttal witnesses. The first was Ms. Frances Barrett, who described the registration procedures for parent voters and the issuance of parent voter cards (Tr. 753-759). The second rebuttal witness was Ms. 20/Baumann, who gave testimony relating to palm cards and the manner in which certain exhibits submitted by appellees had been prepared (Tr. 762-784).

After this testimony, the parties stipulated that the proceedings would constitute a full trial on the merits (Tr. 785) and the case was adjourned (Tr. 789).

On January 4, 1974, Judge Stewart issued an Interim Order which provided that: (1) the May 1, 1973 Community School Board election in School District One was invalid and the positions on the board were vacant; and (2) that pending the election of a new school board Chancellor of the City School District of the City of New York would exercise the statutory and administrative powers of the school board of Community School District One (A. 116-117).

On January 11, 1974, Judge Stewart issued his forty-one

(41) page opinion and order (A. 153-193). Judge Stewart stated

the issue presented to him was two-fold: (1) "Was the May 1st

election conducted generally in a manner which either demonstrated

a racially discriminatory purpose by the defendants and their

agents or which resulted in a racially discriminatory impact on

<sup>20/</sup> See pp. 16-17, supra.

the voting rights of Black, Puerto Rican and Chinese voters and any potential voters and therefore illegal?" And; (2) "If so, is a new election a necessary and proper remedy?" Judge Stewart found that: "The totality of the evidence adduced at trial compels this Court to find that the May 1, 1973 District One School Board election was conducted in a manner which had a substantial discriminatory impact on Black, Puerto Rican and Chinese voters and potential voters" (A. 167-168). The Court supported its finding with a detailed analysis (A. 159-182). In addition, Judge Stewart found that an exact determination of the number of votes that could have changed the results of the election was impossible to make, but as few as 108 might have made a difference (A. 161-163); and appellees exercised due diligence prior to the election (A. 189-190).

The Court found that the conduct in the May 1, 1973 election that had a racially discriminatory effect could be broken down into three basic groupings with categories within these groupings (A. 168-182). The three groupings were: (1) conduct which was irregular or illegal and had a discriminatory impact (A. 169-178); (2) conduct which had a discriminatory impact on the voting rights of minority voters and was neither explained nor justified by appellants (A. 178-181); and (3) instances of intentional discrimination (A. 181-182).

The Opinion then sets forth Judge Stewart's conclusion of law (A. 182-188) and ends with the rationale for the remedy granted (A. 188-192).

The Order: (1) declares the election invalid and the positions on the local board vacant; (2) states that there shall be a special election and the parties may present proposals relating to how it should be conducted; and (3) declares that the Chancellor shall act as the local school board (A. 193).

On February 1, 1974, Judge Stewart issued an order which established the date of the special election, a timetable for registration, petitioning, etc. and the procedures to be followed (A. 216-218). Since that date, the preparations for the special election have been proceeding pursuant to Judge Stewart's timetable.

## Argument

I.

THE DISTRICT COURT'S FINDING
OF RACIAL DISCRIMINATION WAS
NOT "CLEARLY ERRONEOUS"

where the factual findings of a district court are challenged on appeal, the reviewing court may not set them aside unless they are "clearly erroneous." F.R.C.P. 52(a);

Lassiter v. Fleming, 473 F.2d 1374 (2d Cir. 1973). Therefore, in order to reverse the district court's findings of racial discrimination in the conduct of the May 1, 1973 Community School Board election, this Court must hold that those findings were clearly erroneous.

The authority of this Court to hold that Judge Stewart's findings of fact were clearly erroneous is strictly limited by the deference that a reviewing court must give to the decisions of the trier of fact. Zenith Radio Corp. v. Hazeltine Research, Inc., 395 U.S. 106, 123 (1969). In conformance with this principle: (1) this Court may not decide the factual issues de novo, Zenith Radio Corp. v. Hazeltine Research, Inc., supra; (2) facts not proven at trial cannot be introduced on appeal and judicial notice may not be used as a device on appeal to correct any failure to present adequate evidence to the trial court, United States v. Campbell, 351 F.2d 336, 341 (2d Cir. 1965),

cert. denied, 383 U.S. 907 (1966); (3) credibility choices and the resolution of conflicting testimony are decisions for the trial court, and appellate review is limited accordingly, Omega Importing Corp. v. Petri-Kine Camera Co., 451 F.2d 1190, 1197 (2d Cir. 1971); United States ex rel. Fitzgerald v. LaVallee, 461 F.2d 601, 604 (2d Cir. 1972), cert. denied, 409 U.S. 885 (1973); and (4) even if the appellate court might have reached a different result if it had been the trier of fact, it cannot substitute its judgment for that of the trial court. Zenith Radio Corp. v. Hazeltine Research, Inc., supra; United States v. Jones Beach Authority, 255 F.2d 329 (2d Cir. 1958), cert. denied, 358 U.S. 832 (1958); United States ex rel. Fitzgerald v. LaVallee, supra.

The Supreme Court has held:

"The question for the appellate court under Rule 52(a) is not whether it would have made the findings the trial court did, but whether 'on the entire evidence [it] is left with the definite and firm conviction that a mistake has been committed.'" [Citations omitted] Zenith Radio Corp. v. Hazeltine Research, Inc., supra at 123.

Judge Stewart found: "The totality of the evidence adduced at trial compels this Court to find that the May 1, 1973 District One school board election was conducted in a manner which had a substantial discriminatory impact on Black, Puerto Rican and

Chinese voters and potential voters" (A. 168). Therefore, the finding of racial discrimination was based upon the cumulative impact of all of the testimony presented at trial, rather than on one isolated instance of discrimination.

Appellants have made specific attacks on Judge Stewart's findings. The cases previously cited make it clear that to be successful appellants must do more than merely show that the record contains evidence on which an opposite finding of fact might have been based. They must do more than assert that Judge Stewart made the wrong decision. To support their claim that Judge Stewart's finding of fact is clearly erroneous, appellants must demonstrate that the record is virtually devoid of any evidence on which a finding of racial discrimination could be based.

Appellants have failed to satisfy their very substantial burden. Appellees direct the attention of the Court to Judge Stewart's findings of fact (A. 152-182) and the summary of the testimony of the fifty-one (51) witnesses which is set forth herein (see pp. 16-36 hereof). Sixteen (16) witnesses gave testimony which related to problems arising from the late arrival of materials, 21/2 four witnesses gave testimony that related to

Emilio Morante (p. 20); Arturo Santiago (p. 22); Frederick Gaumer (p. 22); Miriam Rios (p. 24-26); Louise Armstrong (p. 28); Armin Ruiz (p. 28); Ray Frankel (p. 29-30); Evelyn Sanselo (p. 30); Edward Blume (p. 30); Natalie Shutzer (p. 30); Abraham Levine (p. 30-31); Sharon Danenberg (p. 31), Emily Arroyo (p. 32); Joseph Fristachi (p. 32-33); Paul Greenberg (p. 33-34); and Evelyn Yakowitz (p. 34-35).

unfair and inconsistent treatment of parent voters, twenty-five

(25) witnesses gave testimony that related to the inconsistent

policy on identification and other irregularities caused by

23/

use of computer print-outs, thirteen witnesses gave testimony

that related to inadequately instructed inspectors and interpreters,

twelve (12) witnesses gave testimony that related to changes

<sup>22/</sup> Judy Baumann (p. 16); Ada Garcia (p. 18); Nuet Fong Ng (p. 26); and Louise Armstrong (p. 28).

Judy Baumann (p. 16); Duncan Whiteside (p. 17); Ada Garcia (p. 18); Flora Gelpi (p. 18-19); Susan Mullgran (p. 19); Miriam Rios (p. 24-26); William Carlotti (p. 20-21); Thomas McCabe (p. 21); Arturo Santiago (p. 22); Maria Medina (p. 23); Nicomedes Sanchez (p. 24); Gloria Ortiz (p. 24); Nuet Fong Ng (p. 26); Sharon Danenberg (p. 31); Abraham Levine (p. 30-31); Lee Ching Chan (p. 26-27); Armin Ruiz (p. 28); Luz Martinez (p. 29); Frances Barrett (p. 36); Marilyn Rudd (p. 32); Evelyn Yakowitz (p. 34-35); Martha Lugo (p. 34); Rafaela Rodriguez (p. 34); Carmen Sameday (p. 34); Joseph Fristachi (pp. 32-33).

<sup>24/</sup> Ada Garcia (p. 18); Elena Diaz (p. 19); Emilio Morante (p. 20); Frederick Gaumer (p. 22); Nicomedes Sanchez (p. 26); Joseph Fristachi (pp. 32-33); Paul Greenberg (pp. 33-34); Evelyn Yakowitz (pp. 34-35); Ling Chin Chan (pp. 26-27); and Yuk Ching Lum (p. 27).

in election districts and polling sites, three (3) witnesses  $\frac{26}{26}$  gave testimony that related to poll placement and ten (10) witnesses gave testimony that related to instances of  $\frac{27}{27}$  intentional discrimination. Appellants have failed to demonstrate that evidence which supports Judge Stewart's finding of racial discrimination cannot be culled from this mass of testimony.

The weakness of appellants' claim of clear error in the finding of racially discriminatory impact resulting from the absence or late arrival of materials is highlighted by the fact

Judy Baumann (p. 16); Willa Kramer (pp. 17-18); Hilda Morales (p. 21); Arturo Santiago (p. 22); Frederick Gaumer (p. 22); Pard Chan (p. 23); Miriam Rios (pp. 24-25); Nuet Fang (Ng (p. 26); Armin Ruiz (p. 28); Sharon Danenberg (p. 26); Joseph Fristachi (pp. 32-33); Evelyn Yakowitz (pp. 34-35).

<sup>26/</sup> Judy Baumann (p. 16); Helene Weinstein (p. 19); Anna Rockitter (p. 23).

<sup>27/</sup> Ada Garcia (p. 18); Elna Diaz (p. 19); Helene Weinstein (p. 19); Susan Mullgran (p. 19); Emilio Morante (p. 20); William Carlotti (pp. 20-21); Louise Armstrong (p. 28); Rosa Rivera (pp. 28-29); Petra Santiago (p. 29); Joseph Fristachi (pp. 32-33).

that the claims of appellant Board of Elections, et al. and appellant Kozlowsky contradict each other. Appellant Board of Elections agrees that P.S. 61 and P.S. 160 were proven to be polling places that serviced predominantly minority voters, but claims that P.S. 63 and P.S. 134 are two predominantly white voting places where materials arrived late (see Appellants' brief, pp. 7-8). Appellant Kozlowsky makes no claim concerning P.S. 63 or P.S. 134, and bases its claim on the allegation that P.S. 61 and P.S. 160 are not polling places which serviced predominantly minority voters (Appellants' brief, p. 31).

Since appellants arrived at different conclusions concerning the evidence relating to absence of materials, it should not be too surprising to them that Judge Stewart also arrived at a conclusion at variance with their own.

It should be noted that Judge Stewart found that the voters injured by delays at P.S. 63, were parent voters who were predominantly minority voters (A. 170). This finding is supported by the testimony of Emilio Morante (Tr. 264-280), and the fact that there is testimony on the record that separate tables were set up to handle parent voters (Tr. 466). In

<sup>28/</sup> Appellant Kozlowsky's claim is not based on testimony adduced at trial.

addition, the testimony relating to P.S. 134 was that it opened only a few minutes late, with virtually no detrimental impact on the voters (Tr. 529). Therefore, there is evidence on the record to support Judge Stewart's finding of racially discriminatory impact.

Since, the essence of appellants' claims of clear error is that Judge Stewart drew the wrong inferences from the evidence adduced, which is not sufficient to support a finding of clear error, it is not necessary for appellees to specifically respond to the claims made by appellants. However, appellees do point out the following facts:

- Appellants' own witnesses testified that multilingual material were not at the polls on election day (Tr. 489-491, 500, 506, 508);
- 2. Appellant Board of Elections mailed out 3,500,000 notices containing polling site information within a period of ten (10) days prior to the election (Tr. 672), and there is testimony that these notices were received by voters after the May 1st election (Tr. 219);

<sup>29/</sup> See the cases cited at pp. 39-40, supra.

- 3. Identification was only required at polling places which serviced predominantly minority voters with the exception of P.S. 63. However at P.S. 63 there was testimony that identification was not being uniformly required (Tr. 260-262);
- 4. Identification was required of parent voters even when buff cards were available (Tr. 418);
- 5. There was testimony that a white voter whose name did not appear on the computer list was allowed to vote (Tr. 277-278);
- 6. The director of appellant Board of Elections' special unit in charge of the Community School Board elections testified that inspectors, as well as interpreters were not trained for this election (Tr. 674-676);
- 7. Ms. Yakowitz, the employee referred to by appellant Board of Elections at p. 16 of its brief, testified that inspectors had received pre-election training (Tr. 727-728);
- 8. There is no evidence on the record that shows population shifts in District One and decisions that can work to the detriment of individuals, such as changes in polling sites and E.D.'s, must be based on facts and not on mere presumptions.

See: Stanley v. Illinois, 405 U.S. 645 (1972);

Vlandis v. Klein, 412 U.S. 441 (1973); United

States Department of Agriculture v. Murray,

413 U.S. 508 (1973); Cleveland Board of

Education v. LaFleur and Cohen v. Chesterfield

County School Board, 42 U.S.L.W. 4186;

- 9. The impact of the changes in the election districts is clearly indicated by plaintiffs'-appellees' Exhibit 14: (a) twenty-four (24) of the thirty-three (33) election districts with 40% or more minority population changed prior to the May 1st election; (b) six (6) of the fourteen (14) election districts with 20% or more minority population changed prior to the election; and (c) only two (2) of the twenty-two (22) election districts containing 0-20% minority population changed prior to the election (A. 248);
- 10. Assembly district lines did not change in District One;

<sup>30/</sup> There are three (3) other election districts within District One boundaries: The 49th E.D. (0-40%) which did not change and the 13th and 33rd E.D.'s (0-60%) of which the 33rd E.D. changed.

- 11. The import of the location of polling sites inside predominantly white buildings was described by Ms. Baumann (Tr. 73-79).

  Basically, it made voting easier for those who merely had to get on an elevator and ride downstairs, rather than go out in the streets. 294 Delancy Street is a Day Care Center not part of a building and services voters from other addresses (Tr. 422-425).

  Likewise, 283 Rivington Street is a Settlement House, not a predominantly minority apartment building. Finally, 170 Avenue C and 77 Columbia Street are predominantly white middle income buildings (A. 253);
- 12. A Puerto Rican election inspector testified that she had engaged in activities which Judge Stewart found to have a racially discriminatory effect (Tr. 432-434); and
- 13. It was appellant Board of Elections' responsibility to provide interpreters (A. 156) and any delegation of authority did not terminate that responsibility.

II.

THE DISTRICT COURT WAS FULLY JUSTIFIED IN SETTING ASIDE THE DISTRICT ONE ELECTION

A. The District Court Applied The Proper Federal Standard in Determining That a New Election was Required.

The district court found that the acts and practices of 31/
the appellants, although largely unintentional, discriminated against minority voters in the school board election in District One conducted on May 1, 1973. The Court held that the racially discriminatory election violated the Fourteenth and Fifteenth Amendments to the Constitution and the Voting Rights Act of 1965 and Amendments of 1970 (A. 185-188). The remedy granted by the district court was to invalidate the school board election of May 1st and order a special election (A. 188-189).

Appellants attack the remedy and cite <u>Bell v. Southwell</u>, 376 F.2d 659 (5th Cir. 1967), as authority for the proposition that in order for a federal court to set aside a state election it must find discrimination that is "gross, unsophisticated,

This court, and others, have recognized that racial discrimination need not be predicated upon intentional acts and practices, but can result as well from arbitrary action. See, e.g., Norwalk CORE v. Norwalk Redevelopment Agency, 395 F.2d 920 (2d Cir. 1968); accord, Hawkins v. Town of Shaw, Miss., 461 F.2d 1171 (5th Cir. 1972) (en banc); Hobson v. Hansen, 269 F. Supp. 401, 497 (D.D.C. 1967), aff'd. sub nom., Smuck v. Hobson, 408 F.2d 175 (D.C. Cir. 1969). More specifically, in an election case, this Court has recognized that the uneven or erroneous application of valid laws based upon arbitrary action of election officials which has a racially discriminatory impact may constitute a denial of equal protection, Powell v. Power, 436 F.2d 84, 88 fn. 7 (1970).

significant and obvious" and "state-imposed, state-enforced."

376 F.2d at 664; brief of appellant Board of Elections at 31-32;

Brief of appellant Kozlowsky at 24-27. However, the Fifth Circuit in Bell did not establish a mechanistic rule to invalidate an election only upon a showing of invidious, intentional, racial discrimination. 376 F.2d at 663. Rather, in Bell, as well as in those decisions preceding and subsequent thereto, including \frac{32}{100} those cited by appellants, the courts have examined and evaluated the seriousness and substantiality of the deprivation

The proper analysis is illustrated by the most recent decision in the Fifth Circuit in Toney v. White, 488 F.2d 310 (5th Cir. 1973) (en banc).

involved, and the immediate circumstances of each case.

<sup>32/ &</sup>lt;u>Hubbard v. Ammerman</u>, 465 F.2d 1169 (5th Cir. 1969), <u>cert. denied</u>, 410 U.S. 910 (1973); <u>Hamer v. Ely</u>, 410 F.2d 152 (5th Cir. 1969), <u>cert. denied</u>, 396 U.S. 942 (1969); <u>Hamer v. Campbell</u>, 358 F.2d 215 (5th Cir. 1966), <u>cert. denied</u>, 325 U.S. 851 (1966).

<sup>33/</sup> Toney v. White, 348 F. Supp. 188 (W.D. La. 1972) invalidated an election upon proof of discrimination in the administration of the electoral process although the acts complained of were unintentional and done in good faith. On appeal, the original panel reversed that part of the decision granting retrospective relief invalidating the election on the grounds that the discrimination was not gross and intentional and that no judicial relief was sought prior to the election. 476 F.2d 203. On the motion of plaintiffs, the Fifth Circuit determined to hear the case en banc and reversed the panel's decision. It did not accept the panel's formalistic interpretation of previous decisions and set forth a "balancing of the equities" test. Appellants' argument herein seems to depend upon the reasoning of the original panel.

In <u>Toney</u>, the Court reviewed its previous decisions and the principles therein and determined that circumstances other than intentional discrimination warrant setting aside an election. Factors to be considered and weighed would include the substantiality of the discrimination, its possible effect on the outcome of the election and the diligence of plaintiffs in asserting their rights. 488 F.2d at 315. The decision of the District Court below is completely consonant with this mode of analysis.

## 1. The discrimination could have changed the outcome of the election.

The district court concluded that "the instances of discrimination were substantial, so much so that they could very well have modified the outcome of the election" (A. 188). The evidence of high registration taken with the findings of unopen polls, missing voter names, the discriminatory identification requirement, missing materials and buff cards, and change in election districts without notification, amply justify the court's finding that large numbers of minority voters were deprived of the opportunity to vote (A. 169).

The district court was correctly mindful of the fact that the uniqueness of the proportional representation system of

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The futility of appellants' attempts to distinguish Toney reveals their misunderstanding of the decision. Appellant Board of Elections claims that Toney only involved "pre-election discriminatory procedures," (brief at 33) and thus, a different standard is applicable. This is a distinction without substance. Appellant Kozlowsky contends that Toney is inapplicable because the voter registrar there was under a permanent injunction not to discriminate, and that any violation of an injunction does not require a showing of intentional discrimination. Brief at 29. No citation for such a sweeping principle of law is offered and, in any event, all election officials always have an affirmative duty to refrain from discriminatory acts (A. 187).

election, makes it impossible to ascertain the exact number of additional or amended ballots necessary to change the results of an election. The Court, therefore, emphasized the magnitude of the discriminatory conduct, rather than attempting a precise count (A. 163). The district court's approach is supported by a recent New York State Supreme decision, People & C v. Beatty,

N.Y.S.2d (Kings Co. 1973) N.Y.L.J. pp. 17-18 (9/14/73), which invalidated the May 1st school board election in District 17 on the basis of fraudulent ballots. In that quo warranto proceeding instituted by the Attorney General, the Court held that because of the use of the proportional representation system and the resultant float in votes which would inure to the benefit of undetermined candidates upon recount, there need be no showing that the results of the election would have changed.

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While appellant Kozlowsky engages in an elaborate and tortuous counting exercise which succeeds only in illustrating the wisdom of the Beatty court, and the court below (Brief at 42-43), the appellant Board of Elections simply contends that there is no showing that "the alleged discrimination affected the outcome of the election" (Brief at 33). However, all that need be shown is the possibility of a changed result. Toney v. White, supra, and, in light of People & C v. Beatty, supra, even

<sup>35/</sup> See analysis of tabulation (A. 161-163), and for a more complete explanation of proportional representation see, Campbell v. Board of Education, 310 F. Supp. 94, 98-99 (E.D.N.Y. 1970).

<sup>36/</sup> The State Supreme Court in New York County recently invalidated the school board election in District 5, Bolar v. Dinkins, Index No. 11415/73, (March 19, 1973), without requiring proof that the outcome of the election would change. These two state court cases and the district court's decision are the only cases invalidating school board elections.

At a Trial Term Part I.C. V of the Supreme Court of the State of New York, held in and for the County of New York at the Courthouse thereof, 60 Centre Street, the Borough of Manhattan, City and State of New York, on the 19 day of March, 1974.

CONSENT JUDGMENT

: Index #11415/73

Cal. £14521

PRESENT:

## Hon. EDWARD J. GREENFIELD Justice

BERNICE BOLAR, MAURICE EDWARDS, JOHN DAVIS, DONALD ELFE, LILLIAN KELLY, CARLETON JENKINS, EDYTHE BABETTE EDWARDS, WYNOLA GLYNN and

RITA SMITH,

Plaintiffs,

-ngainst-

HON. DAVID N. DINKINS, WILLIAM F. LARKIN, CUMERSINDO MARTINEZ and J.J. DUBERSTEIN

consisting of the Board of Elections of the City of New York, PAUL GREENBERG, Director of the Special School Board Unit of the Board of Elections of the City of New York CALVIN A. ALSTON, VIRGINIA L. BELL, JOSE

M. ESPINOZA, LOUISE GAITHER, VALERIE

JORDAN, Reverend LAWRENCE GAITHER, CHARLES

H. MOORE, Jr., DELIA ORTIZ and BENJAMIN W. WATKINS,

Derendants.

A trial having been held in this court on the 12th, 13th, 14th and 15th days of March 1974 before the Honorable Edward J. Greenfield, in Trial Term I.C. V, on the issue of whether the May 1, 1973 District 5 Community School Board election contained so many irregularities and opportunities for fraud that the court should declare the said District 5 Community School Board election null and void and direct that a new election be held; and the plaintiffs, defeated candidates and voters in the said election, having appeared by Harlem Assertion of Rights, Inc., 35 West 125th Street, New York, New York, David W. Weschler, of Counsel, and having presented oral testimony from witnesses Leroy Clark, a professor of law at the New York University School of Law and a Director of the District 5 Count, plaintiff Lillian Kelly,

Margarette Wilson, an election inspector in the District. 5

election, Daniel Wise, Esq., formerly associated with plaintiff counsel, plaintiffs Babette Edwards and Bernice Bolar, Felix Santana and Carrie Santana, both poll watchers in the District election, William Wurtz, Esq., a counsel for plaintiffs, and expert witness Professor Howard Kalodner of the New York Universidence a map of Community School District 5, the names of the candidates in the said election, the location of the 106 polliplaces utilized in said election, and the number of voters in

signatures on Voting Lists and Parent Buff Cards); and having introduced as further evidence the official Tally Sheets of the votes counted in the election following delivery of the voted ballots to a Central Counting Place, a Certified Voting List

each of the 106 election districts (as evidenced by voter

at the polls on the 23rd Election District - 74th Assembly
District, a chart comparing the number of votes cast in each

the 106 election districts with the number of votes counted in the corresponding election district, and the ballots of certain election districts, to wit: 22nd Election District - 71st Assembly District (Espinosa), 52nd Election District - 72nd Assembly District (Espinosa), 51st Election District - 72nd fs Assembly District (Espinosa), 55th Election District - 72nd 5 Assembly District (Lucas), 32nd Election District - 74th Assembly District (Gaither); and the defendants Honorable David N. Dinkins William P. Larkin, Cumersindo Martinez and J.J. Duberstein as rsit Commissioners of the Board of Elections of the City of New York together with defendant Paul Greenberg, as Director of the e Special School Board Unit, all having appeared by Adrian Burke, ng Corporation Counsel of the City of New York, A. Michael Weber, of Counsel; and the defendant winning candidates, Calvin A. Alsto Virginia L. Bell, Jose M. Espinosa, Louise Gaither, Valerie Jorda Reverend Lawrence Gaither, Charles H. Moore, Jr., Delia Ortiz 1e and Benjamin W. Watkins not having appeared and being in default; and the appearing defendants having presented oral testimony from used of

defendant Paul Greenberg; and the court, having heard the testimony of the above-named witnesses and examined the abovementioned stipulated and other documentary evidence, and it appearing to the satisfaction of the court after due deliveration thereon that the election did contain numerous election irregularities and opportunities for fraud and ballot stuffing so that it was uncertain as to who actually were the winners of the said District 5 Community School Board election; / and defendants' counsel having conceded to the court on the third day of trial during the testimony of defendant Paul Greenberg that the evidence indicated the commission of widespread fraud and that a new election should be ordered; and the Attorney General of the State of New York having also appeared by Seth A. Greenwald, Esq. at the request of the Court on the 15th day of March 1974, and having concurred with the Court's finding and expressed no opposition thereto; and the defendants who appeared having joined with plaintiffs in seeking the settlement and signature of this judgment on consent and the ordering of a new election,

NOW, on motion of David W. Weschler, it is

ORDERED, that a declaratory judgment shall be and the same hereby is entered in favor of plaintiffs BERNICE BOLAR, MAURICE EDWARDS, JOHN DAVIS, DONALD ELFE, LILLIAN KELLY, CARLETON JENKINS, EDYTHE BABETTE EDWARDS, WYNOLA GLYNN and RITA SMITH declaring the May 1, 1973 District 5 Community School Board election null and void, and directing that a new election be held for all nine (9) seats on the District 5 Community School Board; and it is further

ORDERED, that a new election for the nine (9) seats on the District 5 Community School Board shall be held on Tuesday, June 11, 1974, except that in the event the statewide primary is also held in June 1974 an application shall be made by the parties hereto regarding an alternate election date, and it is further

ORDERED, that the May 1, 1973 election having been declared invalid, the nine (9) positions on the District 5

Community School Board shall be deemed vacant as of this date, and it is further

held to fill the nine vacancies, management and supervision of
District 5 Community School Board shall revert to the Chancellor
City School District of the City of New York, and it is further

ORDERED, that in the interim until the new election is

ORDERED, that all candidates who were certified to run

in the May 1, 1973 District 5 election shall remain on the ballot unless they are disqualified by reason of change of address or other requirement of law, or unless they remove themselves from the ballot by filing with the Special School Board Unit a written declaration of withdraval of their candidacy in accordance with

the terms of the following paragraph, and it is further



ORDERED, that the Special School Board Unit shall, by a certified mail, return receipt requested letter to all 45 candidates, inform them that a new election shall be held June 11, 1974; and further, that they will automatically appear on the ballot in this election unless, within two weeks of the date indicated in said letter, they return it by certified mail return receipt requested to the Special School Board Unit containing a signed, notarized declaration of withdrawal of their candidacy, and it is further

ORDERED, that any other qualified persons who seek to run in the forthcoming District 5 election may do so by circulating petitions in accordance with law beginning April 15, 1974, and became must file same on or before May 6, 1972, and it is further

ORDERED, that all permanently registered voters in the new election shall vote on the cards maintained in their Central Registration file (Buff Cards), and it is further

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casting of ballots by Parent Voters who are not permanently as here indicated to the registered voters, and it is further

ORDERED, that adequate provisions shall be made for the

ORDERED, that towards this end, Parents who were registered to vote in the May 1, 1973, District 5 Community School Board election need not register again in order to vote in the forthcoming election, and it is further

ORDERED, that voter registration for all voters who may be eligible to vote in the District 5 election (permanently registered and parent) shall be reopened for five (5) consecutive days beginning Monday, April 22, 1974, through Friday, April 26, 1974, and shall also be open for one-half (1/2) day (12:00 noon -

5:00 p.m.) on Saturday, April 27, 1974, and it is further

ORDERED, that Central Registration (at 80 Varick Street and Volunteer Registration Centers) shall be open until ten (10) days before the election, and it is further

ORDERED, that designated personnel from the Special inSchool Board Unit shall be empowered to obtain/formation on the currency of the parent registration from the May 1, 1973 election from the District 5 School principals, and it is further

ORDERED, that the polling places in the new election shall be designated from among public elementary, intermediate and junior high schools, and it is further

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ORDERED, that the newly elected nine member board shall assume its management and supervision of the District 5 Community School Board upon being duly certified, and it is further

ORDERED, that the term of the newly elected District 5 Community School Board shall end on June 30, 1975.

EDWARD J. GREENFIELD

Justice of the Supreme Court

STATE OF NEW YORK, COUNTY OF NEW YORK

The undersigned, an attorney admitted to practice in the courts of New York State, hereby certifies that he has compared the within copy of the Consent Judgment with the original and found it to be a true and complete copy.

Doller ) exole

Dated: New York, New York March 25, 1974 Sir:- Please take notice that the within is a (certified) true copy of a duly entered in the office of the clerk of the within named court on

Dated.

Yours, etc.,

EDWARD R. DUDLEY JR.
HARLEM ASSERTION OF RIGHTS, INC.
Attorney for

Office and Post Office Address
35-43 WEST 125TH STREET
NEW YORK, N. Y. 10027

To

Attorney(s) for

NOTICE OF SETTLEMENT

Sir:—Please take notice that an order

of which the within is a true copy will be presented for settlement to the Hon.

one of the judges of the within named Court, at on the day of 19 at M.

Dated,

Yours, etc.,

EDWARD R. DUDLEY JR.
HARLEM ASSERTION OF RIGHTS, INC.
Atterney for

Office and Post Office Address
35-43 WEST 125TH STREET
NEW YORK, N. Y. 19027

To.

Attorney(s) for

SUPREME COURT STATE OF NEW YORK

BERNICE BOLAR, et. al.

Plaintiffs,

-against-

HON. DAVID N. DINKINS, et.al.

Defendants.

CONSENT JUDGMENT

EDWARD R. DUDLEY JR.

Attorney for Plaintiffs
DAVID W. WESCHLER of Counsel

Office and Post Office Address

HARLEM ASSERTION OF RIGHTS, INC.

35-43 WEST 125TH STREET

To

Attorney(s) for

Service of a copy of the within

is hereby admitted.

Dated,

Attorney(s) for



that may not be required. The Court's findings of the magnitude and substantiality of the discrimination are completely justified by the record and fully supported its finding that, but for the discriminatory acts, the results of the election may possibly have been different.

## 2. Appellees exercised due diligence in asserting their rights.

The district court found that appellees' pre-election diligence was unassailable (A. 189):

Several of these plaintiffs along with other minority voters in New York City instituted at least two successful lawsuits prior to the election, (see p. 3 and p. 8, n. 8, supra) [Lopez v. Dinkins, , 73 Civ. 695 (S.D.N.Y. F. Supp. (1973) and Raimundi v. Board of Elections, 32 N.Y.2d 768, 344 N. S.2d 957 (1973)] seeking relief from unconstitutional procedures. In addition, various groups of minority representatives lobbied the Board of Elections for policy changes. That which was not litigated nor lobbied for prior to the election could not have been, since many of the discriminatory practices did not surface until election day (A. 189-190). Brackets supplied. 38/

<sup>37/</sup> Appellant Kozlowsky's contention that a new election should only fill the 8th and 9th school board seats (Brief at 44), was raised and rejected in Beatty. Such a contention assumes an arithmetic certainty as to the impact of election irregularities which is manifestly unwarranted.

<sup>38/</sup> The record is replete with testimony to support the above finding. (T. 35-37, 45-52, 119, 649-50). Although appellants have repeatedly asserted that the district court commended them for their pre-election efforts, it should be noted that all these efforts were in direct response to the pressure of appellees and other interested citizens through their lawsuits and lobbying efforts (A. 167); see, Brief of appellant Board of Election at 34; Brief of appellant Kozlowsky at 8-9, 18-19.

The rationale for considering the parties' pre-election diligence in determining final relief is to assure that a party cannot await the outcome of an election before complaining of irregularities of which he was previously aware (A. 189); Toney, supra, 488 F.2d at 314. Although each case must turn upon its own facts and circumstances, the Fifth Circuit has held that the burden of proof is on the defendant election officials to show by clear and convincing proof that there was a deliberate bypassing of pre-election judicial relief. Toney v. White, 488 F.2d at 315; (A. 189).

Appellants miscomprehend the requirement of diligence, and further miscomprehend the decision of the district court. It is incredible that anyone could characterize the total involvement of appellees in the electoral process prior to election day, as found by the district court and fully supported by the record, as an attempt "to lay by and gamble upon receiving a favorable decision of the electorate." Toney v. White, 488 F.2d at 314.

As to the appellants' contention that the pre-election

Lopez Order was substantially complied with, the district court

specifically found that the spirit, if not the letter, of the

Lopez Order was violated by appellants' failure to provide

bilingual material on election day and the lack of adequate

language assistance due to the appellant's failure to train

inspectors and interpreters adequately (A. 171, 177-78, 185).

Appellants claim that since there was no challenge to the changes and location of the election districts and polling places, appellees may not complain of its discriminatory impact. Appellants again misconstrue the court's opinion. It was not the changes per se of election districts and polling places that caused discrimination, but rather the fact that these changes occurred primarily in minority areas without proper notification or assistance to voters prior to or on election day (A. 178-180). Therefore, the impact of these changes did not become apparent until May 1, 1973.

In any event, there is no evidence in the record that appellees had actual knowledge and deliberately by-passed any pre-election judicial relief available (A. 189); Toney v. White, supra.

Finally, appellant Kozlowsky raises, for the first time on appeal, the issue of post-election diligence (Brief 21-22), which is nothing more than the defense of laches.

<sup>39/</sup> Appellant Board of Elections attempts to justify its failure to provide adequate language assistance by contending that the law of specificity in the Lopez order as compared to Torres v. Sachs, 73 Civ. 3291, was a contributing factor (Brief at 34-35). However, as pointed out in note 5 of the district court's opinion (A. 156) the substance of the provision in Torres was discussed and a determination made in line with the Torres order. See also A. 177 fn. 31. In any event, appellants should have been mindful of the fact that they have an affirmative duty to assure that the rights of voters are not impaired and should have acted accordingly (A. 187).

The essence of the laches defense is that the defendant has been prejudiced by the unconscionable delay by plaintiff in asserting its claims. See, Polaroid Corp. v. Polarad Electronics Corp., 287 F.2d 492 (2d Cir. 1961), cert. denied, 368 U.S. 820 (1961).

Rule 8(c) of the Federal Rules of Civil Procedure provides that the defense of laches must be affirmatively pleaded, otherwise it is waived. The failure on the part of the appellants to raise laches in the trial court forecloses the appellate court's consideration of the issue. Local 198, AFL-CIO v. Interco, Inc. 415 F.2d 1208, 1212 (8th Cir. 1969), and, this would be true even if the defense had merit. Badway v. United States, 367 F.2d 22 (1st Cir. 1966).

But the defense does not have merit. This action was not commenced in October as both appellants strenuously assert, but with the filing of the summons and complaint on September 18, 1973 (A.A,5) F.R.C.P. 3. In the period between the election and the commencement of this lawsuit the appellees took statements, heard "testimoney," examined official records, collected and analyzed statistical data, prepared a report on the election, and drafted their complaint. The time taken was not excessive in view of the nature and mass of the evidentiary material involved (Tr. 80-90, 94, 98-106, 115, 120, 157-158).

B. In Setting Aside the Election the District Court Applied the Established New York State Remedy.

42 U.S.C. § 1988 provides that a federal court may look to Section 330(2) of the state remedies in formulating relief. Election Law of the State of New York provides that a Court may direct a new election when it is determined that the election in question "has been characterized by fraud or irregularities as to render impossible a determination as to who rightfully was. . . elected" and it has been held that a new election may be ordered even if there is no proof of intentional misconduct. Ippolito v. Power, 22 N.Y.2d 594 (1968). Further, in a recent case considering another May 1, 1973 Community School Board election it was held that because of the use of the proportional election system a showing that the results of the election would probably be different is not required. People & C. v. Beatty, supra. See also Bolar v. Dinkins, supra

<sup>40/</sup> For a discussion of this section, See Moore v. County of Alameda, \_\_\_ U.S. ))) (1973).

<sup>41/</sup> Although <u>Ippolito</u>, <u>supra</u>, arose in connection with Section 330(2) of the Election Law of the State of New York, dealing solely with primary elections, its reasoning would apply equally to a general election, <u>e.g.</u>, school board election. <u>Lehner v. O'Rourke</u>, 339 F. Supp. 309, 314 (S.D.N.Y. 1971).

<sup>42/</sup> A copy of said consent judgment is submitted herewith the filing of appellees' brief.

## CONCLUSION For the foregoing reasons, the district court's opinion and orders should be affirmed. Respectfully submitted, JACK GREENBERG JAMES M. NABRIT, III ERIC SCHNAPPER CHARLES E. WILLIAMS, III Suite 2030 10 Columbus Circle New York, New York 10019 FREDERICK E. SHERMAN 375 Park Avenue New York, New York 10022 Attorneys for Plaintiffs-Appellees OF COUNSEL: IRA BEZOZA

## CERTIFICATE OF SERVICE

I, CHARLES E. WILLIAMS, III, one of the attorneys for plaintiffs-appellees, hereby certify that two (2) copies of the Brief of Plaintiffs-Appellees have been served on attorneys for Defendants-Appellants on this 2nd day of April, 1974.

CHARLES E. WILLIAMS, III

Attorney for Plaintiffs-Appellees

MICHOEIL

r - B 2 1 1974

M-132

UNITED STATES DISTRICT COURT SOUTHERN DISTRICT OF NEW YORK

COALITION FOR EDUCATION IN DISTRICT ONE, et al.,

Plaintiffs.

VB.

THE BOARD OF ELECTIONS OF THE CITY OF NEW YORK, et al,

Defendants.

73 C1v. 3983 5 5 TELED CO. FILED S.D. OF N. T.

## MEMORANDUM AND ORDER

STEWART, DISTRICT JUDGE:

On January 11, 1974, this Court found that the clection of May 1, 1973 for the community school board in Community School Distric: One was conducted in a manner which had a racially discriminatory effect on Black, Fuerto Rican and Chinese voters and potential voters in that district, and was therefore unconstitutional. At that time, we invalidated the May 1 election, declared the seats on the school board vacant, appointed the Chancellor to run the district in the interim, and ordered that a new election be held. On February 1, 1974, this Court ordered that a special three-man panel of officers (Arthur L. Liman, Hector I. Vazquez, Bernard C. Fisher) appointed by this Court act as advisors to this Court, after consultation with city election officials and the plaintiffs, to make recommendations to guarantee that the new election would be held in a manner which guaranteed that the constitutional rights of all

residents of District One would be protected and guaranteed.

panel, several meetings were held between this Court, the panel, the parties to the litigation and the administrator of the Special Unit appointed by the Board of Elections to run the special election. The Board of Elections, Board of Education and Community School District One, main defendants in the original suit, have participated in good faith both in the selection of the three-man panel, and all subsequent proceedings. As a result of these meetings, initial steps have been taken toward establishing registration and nomination procedures for the special election, and a tentative timetable has been discussed.

On February 11, 1974, the defendants Board of Elections, Board of Education, and Community School District One filed a notice of appeal of this Court's decision on the May 1 election, and on February 13, 1974 applied to this Court for a stay pending appeal of "so much of the order of this Court dated January 11, 1974, directing that a special election be held for membership to the school board of Community School District One".

After consideration of all papers submitted and oral argument by the parties on February 19, this Court denies defendants' application for a stay pending appeal for the following reasons:

1. The harm to the plaintiffs' will be compounded if the Court grants a stay pending appeal.

This Court in its January 11, 1974 opinion found substantial violations of plaintiffs' constitutional rights to vote. In ordering a new election, we sought to remedy these violations, and to do so as expeditiously as possible. It is tentatively planned to hold the new election in mid-May. Any delay in taking steps to effectuate the special election will set back the schedule many months, since it is agreed that many voters would be disenfranchised by a New York City election held during the summer months.

Further, any election held in the fall would have to compete for attention with the primary and general elections. Each day District One is run by the Chancellor and not by an elected board is an infringement on the statutory and constitutional rights of the residents of that district. In addition, holding the election next fall would prevent the establishment of educational policy for the 1974-1975 school year by a board which reflects the will of the community.

2. The harm to the defendants caused by a denial of the stay is not great.

Defendants contend that they will be harmed if they are forced to make expenditures to start procedures for the special election, which will be found to have been made unnecessarily if the Court of Appeals reverses our finding that a special elec-

argument. Expenditures made by the Board of Elections to register both parent and regular voters need not be considered wasted expenditures, but rather good investments in future electoral participation.

Additionally, we point to the fact that the Board of Elections, shortly after the January 11 Order, hired on its own initiative an administrator for a Special Unit to run the special election, and has apparently hired a number of staff members for that Unit. Thus, they may already have contracted to make certain substantial expenditures. Also, their counsel and several employees have already participated in the several meetings held to set up the special election. We point this cut only to indicate that the defendants' themselves have not viewed the expenditure of certain time and money: in insuring a constitutionally sound election to have been wasted expenditures.

3. Defendants have not demonstrated that they will likely prevail on the merits of the appeal.

argument which is based on the supposition that we have reached an incorrect result. In this application, the defendants have made no showing that our decision conflicts with any authority, mandatory or otherwise. They have not made even a minimal showing of the likelihood that they will prevail on appeal.

4. The public interest will not be served by the grant of a stay pending appeal.

The public has an interest in the sanctity of the electoral process and in the orderly governance of its schools. We perceive no furthering of this interest by granting a stay and thereby postponing the special election for many months. (See point 1 supra.) For the reasons enumerated in the last section of our January 11 opinion, we believe that all of the residents and parents of District One are entitled to a speedy and constitutional determination of their will as to who should govern and set educational policies for their schools.

For the above reasons, defendants' application for a stay perding appeal of the January 11, 1974 Order in this case is hereby denied.

SO ORDERED.

United States District Jugge

Dated: New York, N. Y. February 20, 1974.